IN THE

Supreme Court of the United States

October Term, 1947

No. 743

THE COHEN, FRIEDLANDER & MARTIN COMPANY,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

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STATEMENT OF CASE

1. Nature of Case and What Happened Below

Respondent, Massachusetts Mutual Life Insurance Company, filed suit in the Northern District of Ohio, Western Division, to cancel a policy of insurance issued to petitioner, The Cohen, Friedlander & Martin Company, upon the life of its president, Hyman Blitz (R. 2).

The trial court, the Honorable Frank L. Kloeb, Judge, decreed cancellation as prayed for in the complaint (R. 100); and upon appeal by petitioner, the United States

Circuit Court of Appeals, for the Sixth Circuit, affirmed (R. 105).

Findings of fact and conclusions of law were duly made and entered by the trial court (R. 93).

2. Opinions in the Courts Below

The written opinion of the trial court is in the record at page 88 and is officially reported in 70 F. Supp. 186; that of the Circuit Court of Appeals is in the record at page 106 and is officially reported in 166 F. 2d 63.

3. Material Provisions of the Application

The application, which was to constitute a part of the policy when issued, was signed by both the petitioner as beneficiary-owner and Blitz as insured (R. 50, 53); and petitioner expressly ratified insured's "representations, statements, answers and agreements contained in Parts 1 and 2 of this application" and agreed to be bound thereby (R. 52).

The material provisions of the application are the following:

> "Have you had at any time
>
> 3. A. Pain, pressure or discomfort in the chest, shortness of breath, palpitation, or any disease of the heart?
>
> No.
>
> • • • •
>
> F. Any serious illness, disease, or injury other than those mentioned, or ever undergone any surgical operation?
>
> No." (R. 54.)
>
> "I understand and agree that:
>
> 1. This application consisting of Parts 1 and 2 taken together shall form the basis of the contract

applied for and shall become a part of said contract when issued.

2. If there has not been paid to the Company's agent the premium on the insurance herein applied for, such insurance shall not become effective until the Company has approved this application at its Home Office, the first premium has been paid and the policy delivered to me or to the owner designated therein during my lifetime; and that thereupon the insurance shall become effective upon the date of issue stated in said policy." (R. 56.)

4. Statement of the Facts

Although the salient facts are set out in the findings of fact of the trial court (R. 93), and in the opinions of the trial court (R. 88) and the Circuit Court of Appeals (R. 106), it may be helpful to state them here in a little more detail, since the statement in petitioner's brief is incomplete.

On August 29, 1945, petitioner joined with Hyman Blitz, its president, in an application to the respondent for a policy of insurance in the amount of Forty Thousand Dollars ($40,000) upon the life of Blitz, in which petitioner was to be beneficiary and owner (R. 50).*

The petitioner *did not prepay* the premium; in fact, the premium was not paid until the policy was delivered on September 19th, a week after Blitz had been stricken with a critical heart attack (R. 67).

On August 30, 1945, and August 31, 1945, two physicians, each acting for the respondent, made medical examinations in Toledo of Hyman Blitz. Those examinations

* In addition to these references to the record, it may be noted that all exhibits referred to in this brief were received in evidence at one time (R. 12).

failed to disclose any disease of the heart or other physical conditions fatal to his insurability (R. 53-60). The application, showing the results of these examinations, was forwarded to the Home Office of the respondent in Springfield, Massachusetts.

In due course the application was referred to Mr. Michael Marchese, assistant secretary of the respondent in charge of its underwriting department, and Dr. Howard Brown, its associate medical doctor, for examination and approval, or disapproval (R. 19, 26). Dr. Brown caused certain inquiries to be addressed to Dr. A. A. Applebaum, of Toledo, with whom Hyman Blitz had consulted from time to time and whose name appeared in the application as having made periodical health examinations of Hyman Blitz (R. 19, 20, 75). Mr. Marchese initiated inquiries concerning the aviation habits and intentions of Hyman Blitz (R. 26, 77, 78). These inquiries developed no facts indicating that Hyman Blitz was unacceptable as an insurance risk.

Mr. Marchese and Dr. Brown completed their investigations on or about September 17, 1945, and relying upon the statements contained in the application and the negative results of their inquiries, approved the application on that date; and the policy was issued and mailed the same day to the respondent's general agent in Toledo, Frank O. D. White, for delivery to the petitioner (R. 21, 26, 27, 76).

The policy having arrived in the offices of the general agent on September 18th or 19th, it was given to Irving E. Goldman, the soliciting agent, for delivery. On September 19th, Mr. Goldman took the policy to the petitioner's offices in Toledo and there delivered it to the petitioner by handing it personally to Lyle C. Remdt, the secretary and treasurer of the company, and the officer charged by the petitioner with the duty of arranging for and carrying out the details in connection with the procurement of the

policy. Mr. Remdt immediately caused the company's check for the first year's premium in the amount of $4,910 to be issued and delivered to Mr. Goldman, at the same time accepting delivery of the policy (R. 66, 67).

During the period from August 31st to September 19th, while the application was being checked at the home office, there occurred events which, upon their face, demonstrated the complete lack of insurability of Hyman Blitz. On September 9, 1945, Hyman Blitz consulted with J. B. Hirsch, M. D., of Toledo (R. 16). Immediately following that consultation he went to New York City and on September 12, 1945, at about 2:30 o'clock a. m., suffered an acute heart attack, technically described as an angina pectoris, accompanied by a coronary thrombosis and a posterior wall myocardial infarction. He was then in the Hotel New Yorker, and was first attended by the hotel physician and shortly thereafter by Dr. Frederick King of New York. At Dr. King's direction he was removed by stretcher and ambulance to Park East Hospital in New York where he was admitted on September 12th at approximately 12:30 o'clock p. m., He remained in that hospital until October 10, 1945, when he was brought to Toledo against Dr. King's advice (R. 63). While in the hospital and prior to September 17th, he suffered another attack similar in nature to that suffered by him on September 12th (R. 62). He was in a critical condition from September 12th to September 19th.

Prior to September 17th, the petitioner and its principal officers, Richard Edmunds, chairman of the board, Lyle C. Remdt, secretary and treasurer, J. Frank Delaplane, vice president, and, of course, Hyman Blitz, himself, the president, were fully informed of the facts related in the preceding paragraph (R. 66, 67).

No information of any kind, however, was brought to the respondent of these facts prior to September 17th,

when Hyman Blitz was approved as an insurance risk, or prior to September 19th when the policy was delivered, and no effort of any kind was made by petitioner or by its officers or by anyone on its behalf to bring these facts to the attention of the respondent (R. 66, 67); in fact, respondent first learned of these facts from the notice of claim and proof of death on or about April 18, 1946 (R. 22, 70, 72).

Dr. Brown and Mr. Marchese both testified that in approving the application and in issuing the policy they relied upon the statements and representations contained in the application, as supplemented by the results of their investigation, and both testified positively that had they known prior to the approval of the application and the issuance of the policy that Hyman Blitz had sustained a severe heart attack on or about September 12, 1945, and was confined to the hospital, they would not have approved the application or ordered the policy issued (R. 21, 22, 27).

It is significant to note that at the time Mr. Goldman delivered the policy to Mr. Remdt on September 19, 1945, he made specific inquiry of Mr. Remdt if Mr. Blitz was at home (thereby offering an opportunity to Mr. Remdt to make the disclosure of his knowledge of the then physical condition of Mr. Blitz), and that Mr. Remdt in reply merely said—"No, he is still in New York," thereby evading disclosure and deliberately leaving the impression with Mr. Goldman that Mr. Blitz was in good health and actively engaged in the business of the company (R. 67).

Mr. Blitz died on March 31, 1946, in St. Vincent's Hospital in Toledo as a result of another acute heart attack, diagnosed by his attending physician as of the same type and nature as the attack suffered by him in New York in September 1945 (R. 69).

Upon receipt of information from the notice of claim and proof of death on April 18, 1946, that Blitz had suffered heart attacks before approval of the policy, respond-

ent promptly served upon the petitioner a notice of the cancellation of the policy and tendered to petitioner the premium paid by it on September 19, 1945, with interest to the date of the tender (R. 68, 72). This tender having been refused by petitioner, the respondent brought this suit to cancel the policy.

5. The Issue

The issue presented in this case is simple and clear; whether under the terms of the application for insurance set out at pages 2-3 of this brief, and under elementary principles of equity and good faith which appertain to policies of life insurance, petitioner was guilty of fraudulent nondisclosure, in failing to apprise respondent, in the course of the negotiations for the policy, of the knowledge it had of the change in the health of the insured, rendering him uninsurable, which occurred prior to the payment of the first premium and delivery of the policy, thereby rendering the contract void at the option of respondent.

Both lower courts answered this question in the affirmative; and the trial judge in his opinion used this appropriate language (R. 92; 70 F. Supp. 188, 189):

> "The Golden Rule is an unlisted, but yet a very pertinent rule of equity that has particular application where the contract at issue is one '*uberrimae fidei*'.
>
> * * * * * *
>
> "The situation we find here is shocking to the conscience. It presents a bold attempt to exchange $4,910.00 for $40,000.00 with the defendant in possession of all the facts and the plaintiff wholly ignorant of the material fact that Mr. Blitz, on whose life the so-called 'risk' was to be taken, was at the time virtually on his death bed.
>
> "Good law is but a reflection of good conscience.

When it ceases to be such, then it is no longer good law for an enlightened society. Good conscience, as well as good law, here requires the cancellation of the contract."

ARGUMENT

1. Summary of Argument

1. The facts in the case at bar are substantially identical with those in the leading case of *Stipcich vs. Metropolitan Life Insurance Co.*, 277 U. S. 311; 48 S. Ct. 512; 72 L. Ed. 895, and the principles of law announced in that case govern this case. Both lower courts found this to be true. The trial court said (R. 90; 70 F. Supp. 188):

> "The facts of this case come squarely within the facts of *Stipcich vs. Metropolitan Life Insurance Company*, 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895. It is unnecessary to quote from that opinion. A study of that case will satisfy the reader that the facts of the case cannot be differentiated from the instant case. The principles of law laid down in the *Stipcich* case are controlling in the instant case."

The United States Circuit Court of Appeals in its opinion said (R. 109, 111; 166 F. 2d 65, 66):

> "There is very little difference between the *Stipcich* case and the case before us. * * * The fact that the insurance liability was to be related back to a prior date, only after the policy was delivered, does not differentiate the case from the *Stipcich* case. In both, liability was to attach, only upon delivery of the policy. * * * we, accordingly, follow the *Stipcich* case as the controlling authority."

2. The doctrine of *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, is not applicable because there are no controlling Ohio statutes, or decisions in point upon their

facts. Therefore, the rule of the *Stipcich* case applies without limitation.

Both lower courts so found. The District Court in its opinion said (R. 90; 70 F. Supp. 188):

> "No Ohio case has been cited, and the court has been unable to find one, where the facts are substantially in accord with the facts in the instant case."

The Circuit Court of Appeals in its opinion said (R. 110, 111; 166 F. 2d 66):

> "There are no Ohio statutes or decisions of the Ohio courts upon the point in question, and we, accordingly, follow the *Stipcich* case as the controlling authority."

3. Although there is no Ohio case in point in its facts, the Ohio Supreme Court has definitely recognized that the principle of good faith or of *"uberrimae fidei"* is applicable to life insurance contracts in Ohio. The District Court after pointing out that there was no Ohio case in point upon its facts said (R. 90; 70 F. Supp. 188):

> "However, in the case of *John Hancock Mutual Life Ins. Co. vs. Luzio,* 123 Ohio St. 616, at page 622, 176 N. E. 446, 449, the Supreme Court of Ohio has this to say: ' * * * But if the insured fails to disclose facts and conditions, of which he is aware, materially affecting the risk, the insured cannot recover unless the company waives forfeiture after it obtains knowledge of such undisclosed facts and conditions. *Stipcich vs. Metropolitan Life Ins. Co.,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895'."

4. The statements made by Blitz and petitioner in the application for insurance concerning the state of health of Blitz were continuing representations, and at the time the premium was paid and the policy delivered, these representations were not true; and hence, fraud having intervened, no valid contract of insurance came into existence.

There had been no meeting of the minds on the contract; the offer of petitioner had not been accepted before the intervention of petitioner's fraud. *Stipcich vs. Metropolitan Life Ins. Co., supra,* 316, 317; *Hartford Fire Insurance Co. vs. Whitman,* 75 O. S. 312, 319.

5. *Section 9391* of the General Code of Ohio, set out in petitioner's brief at page 13, is not material or applicable here. It is limited in its application by its express terms and by the construction given it by the Ohio courts to defenses founded upon breach of warranties and representations in applications for life insurance. *Cohen, Friedlander & Martin Co. vs. Mass. Mutual Life Ins. Co.,* 166 F. 2d 63, 66; *Metropolitan Life Ins. Co. vs. Howle,* 62 O. S. 204; 56 N. E. 908; *Lumpkin vs. Metropolitan Life Ins. Co.,* 75 O. App. 310; 62 N. E. 2d 189.

2. The Case of Stipcich vs. Metropolitan Life Ins. Co. Is Not Distinguishable Upon Its Facts and Is Controlling

The case of *Stipcich vs. Metropolitan Life Ins. Co., supra,* is the leading case on the question presented here. It cannot be differentiated in its facts from those of the case at bar, and the principles of law announced and applied in that case govern this case and require the result reached by the lower courts.

In the *Stipcich* case, as in the instant case, after the application was made and after the insured was examined by the company's physician, a change in his condition of health, serious in nature, developed. In the *Stipcich* case it was the reoccurrence of a duodenal ulcer. In the case at bar, it was an acute heart attack. The policy here and the policy in the *Stipcich* case contained no provisions specifically relating to the effect of a change of health and neither provided that the insured must be in good health at the time of the delivery of the policy. In the *Stipcich*

case, as here, the insured did not advise the insurance company of the facts concerning the change of health of the insured before the policy was approved or before it was delivered, or before the first premium was paid and accepted, and in that case, as here, no inquiry was made concerning the condition of the health of the insured at the time the policy was delivered and the first premium accepted.

As the Circuit Court of Appeals says in its opinion (R. 109; 166 F. 2d 65), the pertinent provisions of the two applications were substantially the same. We place them side by side for the convenience of the court.

Stipcich Case	*The Case at Bar*
"4. That the Company shall incur no liability under this application until it has been received, approved and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."	"2. If there has not been paid to the Company's agent the premium on the insurance herein applied for, such insurance shall not become effective until the Company has approved this application at its Home Office, the first premium has been paid and the policy delivered to me or to the owner designated therein during my lifetime; and that thereupon the insurance shall become effective upon the date of issue stated in said policy."

To say that the insurance company shall incur no "liability" until the policy is delivered, and to say that the insurance shall not become "effective" until that time, clearly is to say the same thing. The only "liability" that could be involved is the insurance liability. The fact

that in the instant case after the insurance or the insurance liability went into effect it was then, *but only then*, to be related back does not differentiate these two applications, since under each the insurance liability was to attach for the first time when the policy was delivered. On the questions material here, therefore, the provisions of the two applications are identical in meaning.

This court in the *Stipcich* case applied three controlling principles of law equally applicable here, to-wit: (1) the contract of insurance became effective only upon delivery of the policy; (2) irrespective of the stipulations of the parties, elementary principles of fair dealing and equity required a full disclosure by the insured of his change of health; and (3) the statements in the application were continuing representations up until the very moment of the delivery of the policy. This court said on page 316 of the opinion:

> "Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. *Carter vs. Boehm*, 3 Burrows, 1905; *Livingston vs. Maryland Insurance Co.*, 6 Cranch, 274; *McLanahan vs. Universal Insurance Co.*, 1 Pet. 170; *Phoneix Life Insurance Co. vs. Raddin*, 120 U. S. 183, 189; *Hardman vs. Firemen's Insurance Co.*, 20 Fed. 594."

and with reference to the absence of any express provision in the application of the policy requiring full disclosure by the insured of all material facts affecting the risk, this court said on page 318:

> "The obligation was not one stipulated for by the parties, but is one imposed by law as a result of the relationship assumed by them and because of the peculiar character of the insurance contract. The necessity for complying with it is not dispensed with by the failure of the insurer to stipulate in the policy for such disclosure."

The court further said on page 316 of the opinion:

"even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure. If he fails to do so the company may, despite its acceptance of the application, decline to issue a policy, *Canning vs. Farquhar*, 16 Q. B. D. 727; *McKenzie vs. Northwestern Mutual Life Insurance Co.*, 26 Ga. App. 225, or if a policy has been issued, it has a valid defense to a suit upon it. *Equitable Life Assurance Society vs. McElroy*, 83 Fed. 631, 636, 637.

Compare *Traill vs. Baring*, 4 DeG. J. & S. 318; *Allis-Chalmers Co. vs Fidelity & Deposit Co. of Maryland*, 114 L. T. 433; compare *Piedmont and Arlington Life Insurance Co. vs. Ewing*, 92 U. S. 377."

The *Stipcich* case, therefore, is directly in point and controlling on every material fact. It has been cited by innumerable courts and has found universal acceptance—as a glance at the citator will demonstrate. The rule it announced previously had been recognized by this court in the case of *Piedmont and Arlington Life Insurance Co. vs. Ewing, Admr.*, 92 U. S. 377; 23 L. Ed. 610; and by the Circuit Court of Appeals for the Seventh Circuit in *Equitable Life Assurance Society vs. McElroy, et al.* (1897) 83 Fed. 631. It has been expressly followed by the court below in *New York Life Insurance Co. vs. Gay*, 36 F. 2d 634; 48 F. 2d 595; cert. denied 284 U. S. 624.

3. The Ohio Law Is in Harmony With the Law Announced in the Stipcich Case

The principle of law which underlies the result in the *Stipcich* case is that life insurance contracts are contracts *uberrimae fidei,* and that the parties thereto, therefore, must exercise toward each other in their negotiations the utmost good faith.

Since it is conceded that there is no case in Ohio in point, our inquiry must be limited to the question whether life insurance contracts are contracts *uberrimae fidei* in Ohio.

The case of *John Hancock Mutual Life Ins. Co. vs. Luzio,* 123 O. S. 616, which was cited by the District Court in its opinion (R. 90, 91; 70 F. Supp. 188) gives a definite answer to that question, for in that recent decision the Ohio Supreme Court, Ohio's court of last resort, on page 622 said:

> "But if the insured fails to disclose facts and conditions, of which he is aware, materially affecting the risk, the insured cannot recover unless the company waives forfeiture after it obtains knowledge of such undisclosed facts and conditions. *Stipcich vs. Metropolitan Life Ins. Co.,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895."

The Ohio cases relied upon by the petitioner are not in point in their facts, and are entirely consistent with the *Stipcich* and *Luzio* cases.

In *Insurance Co. vs. Ford,* 2 O. App. 410 (decided by the Court of Appeals of Geauga County, February 4, 1914, long before the *Stipcich* case was decided), the court cites and quotes with approval (page 415) the case of *Piedmont and Arlington Life Ins. Co. vs. Ewing, Admr.,* 92 U. S. 377, referring to that case as a "leading" case. The *Ewing* case as strongly supports the proposition that life insurance contracts are contracts *uberrimae fidei,* as does the

Stipcich case, and this court in the *Stipcich* case also cited, approved and relied upon the *Ewing* case.

The court in the *Ford* case held that there was no fraudulent concealment of any material fact by the insured and that the *Ewing* case, therefore, did not apply. In the *Ford* case the premium was *prepaid;* the application made the condition of the health of the insured at the date of the application material in the event of prepayment of the premium; the insured had been examined and as a result of that examination was found to have been insurable as of that date to the satisfaction of the company; and the evidence disclosed no facts to support a claim that the company, when it approved the policy, was lacking of any fact known to the insured bearing upon the condition of his health or his insurability at the date of the application.

The result in the *Ford* case, therefore, is entirely consistent with the *Stipcich* case and with the result here; and the fact that the *Ewing* case and other like cases were cited and approved makes it probable that had the facts in the *Ford* case been as they are here, the result would have been the same as here.

The petitioner next cites and relies upon the case of *New York Life Insurance Co. vs. Clutts,* 125 O. S. 555; 182 N. E. 500, decided by the Supreme Court of Ohio on January 15, 1932, and, in particular, upon the first paragraph of the syllabus of that case.

An analysis of the facts in the *Clutts* case will demonstrate that they differ widely from the facts in the case at bar. The first paragraph of the syllabus of that case may be misleading, unless read in relation to the facts of the case. "The syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, but such pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the court." *Williamson Co. vs. Radich,* 128 O. S. 124, par. 1 of the syllabus.

Unfortunately, the statement of the facts preceding the opinion of the Ohio Supreme Court is very brief and leaves some important facts to inference. We, therefore, have obtained and can make available to this court a copy of the record which was before the Ohio Supreme Court.

This record shows that the insured, one George E. Krutz, made application in Louisville, Kentucky, for this policy of insurance on March 7, 1930. He was duly examined and the examination disclosed no health defects. *On March 12, 1930, he paid the first annual premium* on the policy to the company and on March 12, 1930, the same date, the company accepted the application, issued the policy, dated it as of that date and as of that date mailed it to the company's general agent at Louisville, Kentucky. On March 15th the general agent mailed it to the company's local agent at Ashland, Kentucky, for delivery to the insured, and on March 17th the local agent made manual delivery of the policy to the residence of the insured.

The delivery was made to the insured's housekeeper, who informed the local agent that the insured was ill with a headache and was resting. The agent left the policy without making any investigation concerning this illness. The evidence showed no change in the health of the insured from March 7th, the date of the application, to March 12th, the date when the application was accepted, the policy issued, dated and forwarded for delivery; and the evidence showed no lack of insurability as of March 7th, the date of the application.

The application provided, as does the application in the instant case, that in the event the premium was prepaid, then the applicant was to be entitled to the insurance if the company was satisfied that he was insurable *as of the time of the making of the application.* This provision of the application is quoted in full in the Supreme Court's opinion. The court with reference thereto said:

"we find that the contract is made in consideration of the application and the payment in advance of $56.38, the receipt of which is acknowledged on the 12th day of March, 1930."

On Sunday, March 16th, the date before the policy was taken to the home of the insured by the company's Ashland agent, the insured had suffered an attack of nose bleed and was treated by two physicians. This nose bleed, described also as a hemorrhage, was successfully stopped the same day as a result of this treatment. There is no indication that the insured had any reason to believe that the nose bleed was the occasion for any deep concern on his part, or that on March 17th he could have had any reason to think that he was withholding any material information from the company or its agent. It was not until Thursday, March 20th, that he had a second hemorrhage which then was considered of enough consequence that he was ordered hospitalized, and it was then for the first time that his trouble was diagnosed as a type of lukemia which turned out to be so serious that he died the next day, that is, March 21st.

The opinion of the Court of Appeals is not reported but is, of course, in the record which was before the Supreme Court of Ohio. This opinion reflects the fact that the cases of *John Hancock Mutual Life Ins. Co. vs. Luzio* and *Stipcich vs. Metropolitan Life Ins. Co.*, were cited and relied upon by the insurance company. The Court of Appeals found no evidence of any misrepresentation in the application and held that because of the prepayment of the premium, the policy was to be considered as delivered not later than March 15th, when it was mailed by the general agent at Louisville to the local agent at Ashland. March 15th, of course, was before the first hemorrhage which was suffered by the insured, that hemorrhage having occurred on March 16th.

The Court of Appeals held that since there could not have been any fraudulent non-disclosure by the insured as of March 15th, the *Luzio* and *Stipcich* cases had no application.

The *Clutts* case, therefore, is in point only to the extent that it, by necessary inference, recognizes the fact that life insurance contracts are contracts *uberrimae fidei*.

One other Ohio case which is relied upon by the petitioner is *Duncan vs. John Hancock Mutual Life Ins. Co.*, 137 O. S. 441. In that case the company accepted a *prepayment of the premium* which accompanied an application containing provisions as to the effect of prepayment somewhat similar, but not identical, to the provisions of the application made by petitioner here, provisions which here are not material because the premium was not prepaid.

In the *Duncan* case the insurance company also had issued a *binding receipt* in exchange for the premium paid and the company, therefore, by so doing clearly *had* made a contract. The only question before the court in the *Duncan* case was what that contract was. No question of fraudulent concealment or any fraud of any kind on the part of the insured was involved and the case cannot be considered inconsistent with the *Stipcich, Gay* and *Luzio* cases, or as remotely bearing upon the important question here, *i.e.*, whether in Ohio life insurance contracts are contracts *uberrimae fidei*.

The *Duncan* case was clarified and distinguished in the later case of *Leube vs. The Prudential Ins. Co. of America*, 147 O. S. 450.

It is apparent, therefore, that the lower courts were correct in finding and holding that no Ohio case was in point or controlling, and that, therefore, the rule of the *Stipcich* case applied here without limitation. The lower courts were also fortified in their decision by the fact that

the Ohio Supreme Court has definitely approved the principle that life insurance contracts require the utmost good faith upon the part of both parties.

4. Other Authorities Cited By Petitioner Are Not in Point

Under the heading "General Authorities and Decisions From Other Jurisdictions," petitioner's brief cites the cases of

Ames vs. New York Life Ins. Co. (Minn. 1922), 191 N. W. 274.

New York Life Ins. Co. vs. Moats (9th Cir. 1913), 207 Fed. 481.

Grier vs. Mutual Life Ins. Co. (N. C. 1903), 44 S. E. 28.

Watson vs. Metropolitan Ins. Co. (Pa. 1941), 21 Atl. 2d 503.

The *Ames* case was decided by the Supreme Court of Minnesota long before the *Stipcich* case. In that case the illness of the insured had occurred after the application was accepted and the policy issued, contrary to the fact here. The court recognized the duty of applicants for life insurance policies to make full disclosure of all material facts while negotiations are pending between the parties. It will be noted that in the part of the opinion, quoted on page 19 of petitioner's brief, the court said:

> "Unlike most of the cases in which the doctrine has been asserted, the negotiations between the parties were no longer pending * * *."

The court, therefore, considered that the acceptance by the company of the application and its issuance of the policy ended the negotiations. In the instant case the serious illness of Hyman Blitz occurred even before the application was accepted and before the policy was issued. The case, therefore, is not in point.

The *Moats* case also was decided before the *Stipcich* case. We fail to see how under any theory the reasons given by the court for its decision in the *Moats* case can be reconciled with the *Stipcich* case. In the *Moats* case the premium had been prepaid, which fact, by reason of the terms of the application, gave foundation for an argument that the parties had contracted on the basis of conditions as they existed as of the date of the application. The *Moats* case, therefore, in any event, presents an entirely different factual situation.

In the *Grier* case, decided by the Supreme Court of North Carolina in 1903, the insured had given a "binding receipt" at the time the application was made, through which the agent, acting for the insured, agreed that the insurance should be in force from that date subject to the then insurability of the insured. A contract, therefore, came into being as of that date, contrary to the fact here. The insured's illness occurred after that date but before the policy was delivered. The policy contained a good health clause. The Supreme Court of Georgia held that "in the absence of fraud" the delivery of the policy was a waiver of the benefits of the good health clause. This holding, by the way, is contrary to the great weight of authority and contrary to the Ohio law. The case obviously is not of any consequence in this case.

In the *Watson* case there was no fraudulent concealment of any kind involved. After the policy was issued and tender of it had been made to the insured, insured asked for some additional time in which to pay the premium, which was granted to him. A week or so later when he paid the premium and accepted the policy he was suffering from a cold or bronchial asthma of which the agent of the company was informed at the time of the delivery. The opinion in the *Watson* case, at pages 509-510 of the opinion, cites the *Stipcich* case with approval.

5. Fallacies in Petitioner's Argument

The entire burden of the argument advanced by the petitioner proceeds upon the fallacious proposition that its own application for the policy in and of itself gave rise to some contract between the respondent and petitioner. In making the argument, the petitioner necessarily disregards utterly the fact that the application was nothing more than its own request for a policy unsupported by any consideration and, therefore, at best nothing more than a revocable offer which was submitted by petitioner to respondent.

Had the petitioner tendered *prepayment* of the premium and had that tender been accepted by the respondent, there might have been some basis for its claim that there was a contract between the parties prior to the delivery of the policy. The authorities even differ on that proposition. *New York Life Ins. Co. vs. Gay, supra.* That, however, was not the fact here where the premium was not prepaid, and where fraud intervened before the premium was paid and the policy delivered.

The petitioner points with emphasis to the statement in the application that *after* the policy becomes effective by delivery, it shall *thereupon* "become effective upon the date of issue stated in the policy" and to the fact that the policy when delivered bore a date prior to the date of the application, and from these circumstances argues that in some manner that there came into being a contract as of the date of the application or as of the date of the policy.

Such an argument contains the same fundamental fallacy—it assumes that the application is the contract. The application still was only an offer not binding the respondent in any respect without regard to any of its provisions until accepted. That offer was not accepted by the very terms of the application until the policy was delivered, and the petitioner, having procured the consummation of

the contract by fraud, cannot now rely upon any provision of that contract without regard to any date which it may bear, to escape the consequences of its own fraud. The policy so dated is the very thing which is tainted by petitioner's own fraud.

The petitioner also argues that the respondent collected a premium for the period from August 10th, the date of the policy, to September 19th, the date of its delivery, asserting in effect that the petitioner will not have been fairly treated if it received no coverage for that period.

Such an argument overlooks the fact that the acceptance of the premium by the respondent was procured by the fraud of petitioner, and that if this fraud had not intervened the premium would not have been accepted and the petitioner would have been in exactly the same position that it will be in when the premium with interest is returned to it. That argument also overlooks the fact that the insurance involved was not insurance against a change in health of the prospective insured, but was insurance against his death, which had not occurred, of course, when the policy was delivered. It also overlooks the fact that the only purpose in predating the policy was to give the petitioner the benefit of a lower premium (R. 28).

Since Hyman Blitz, for insurance purposes, was to be considered as a year younger as of August 10th than he would have been as of the date of the application or the date of the policy, the difference in annual premium amounted to approximately Four Hundred Dollars and the fact was, therefore, that the respondent on September 19th was paid several hundred dollars *less than it would have been paid had the policy been dated as of one of those later dates.*

This practice is customary and common in the negotiation of life insurance contracts. See *Couch on Insurance,*

Vol. 6, page 4799, Section 1330, and *Henry vs. Reich*, 80 O. App. 185. The syllabus of the last cited case is as follows:

> "Where an applicant for life insurance requests in his application that the policy take effect as of a date prior to the application, for the purpose of taking advantage of a lesser age and consequent lesser premium; the policy is delivered to applicant, the first annual premium is paid by cognovit note and applicant becomes insured, all on a date subsequent to the application; and the policy reads that the first annual premium was due on the requested effective date for a period ending one year from such date; there is no failure of consideration for the note or fraud in its induction on the ground that the applicant was not insured from the time the first annual premium became due, but was insured only from the time of delivery of the policy."

6. Ohio General Code, Section 9391 Is Not Applicable

The petitioner argues in its brief that the provisions of *Ohio General Code*, Section 9391, having reference to false answers to interrogatories in insurance applications and defenses based upon such applications is applicable and that it is of some assistance to the petitioner in its claim of right to recover under this policy.

The section is quoted in full on page 13 of petitioner's brief and we will not repeat it here. It is limited in its application to positive or affirmative misrepresentations made in the application. It has no reference or application to a defense based upon a fraudulent nondisclosure of material facts which came to the attention of the insured after the application was made.

Even though the statute could have some application, it is perfectly evident that at the time the application was approved in the home office of the respondent on Septem-

ber 17, 1945, and at the time of the delivery of the policy on September 19, 1945, the representation in the application that Hyman Blitz had not had at any time "pain, pressure or discomfort of the chest, shortness of breath, palpitation or any disease of the heart," was utterly false and was known to the insured to be false, and if this representation is to be considered as having been made either as of September 17th or September 19th, as the *Stipcich* and other cases have said, then it was a misrepresentation which was wilfully false, fraudulent and was a misrepresentation of the material fact and the evidence establishes beyond any doubt that the policy would not have been issued if the company had been informed of the true facts. It follows, therefore, that even if Section 9391 were applicable, respondent's proof fully satisfied the requirements of that statute.

CONCLUSION

It is submitted that the courts below have reached the right result in this case. There are no special or important reasons for the granting of this petition; no conflicts of decisions appear and no controlling local law is cited at variance with the decisions of the lower courts.

The case is ruled by the decision of this court in the *Stipcich* case. The petition, therefore, should be denied.

Respectfully submitted,

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